

September 6, 2006

DECISION AND ORDER  
OF THE DEPARTMENT OF ENERGY

**Appeal**

Name of Petitioner: National Security Archive

Date of Filing: August 16, 2005

Case Number: TFA-0115

The National Security Archive filed an Appeal from a determination that the Headquarters FOIA/Privacy Act Group (FOIA/PA) of the Department of Energy issued on August 2, 2005. In that determination, FOIA/PA denied a request for information that the Appellant submitted to the DOE pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. FOIA/PA located one document that was responsive to the National Security Archive's request, which it withheld in its entirety. FOIA/PA determined that the withheld document contained classified information and that removal of the classified information from those documents would result in the release of no meaningful information. This Appeal, if granted, would require the DOE to release that document.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b).

**I. Background**

On August 7, 1996, the National Security Archive requested intelligence reports produced by the Atomic Energy Commission about a possible Chinese nuclear weapons test from 1964. After considerable involvement of the History and Archives Group of the Office of the Executive Secretariat and the Office of Classified and Controlled Information Review, FOIA/PA responded to the request by informing the National Security Archive that it had located one responsive document, a memorandum to Atomic Energy Commission Chairman Glenn T. Seaborg, dated November 19, 1964, concerning the Chinese nuclear weapons test in October 1964. In its determination letter, FOIA/PA explained that the responsive document contained information properly classified as National Security Information pursuant to Executive Order 12958 and information properly classified as Restricted Data pursuant to the Atomic Energy Act, 42 U.S.C. §§ 2161-2166, therefore warranting

protection from disclosure under Exemptions 1 and 3 of the FOIA. Finally, the determination letter stated that there was unclassified material in the document that was inextricably intertwined with the classified information. It further stated that “[t]he release of the information remaining after removal of the classified information, therefore, would not provide any meaningful information.”

The present Appeal seeks the disclosure of the responsive document. In its Appeal, the National Security Archive sought further review of the document to determine “whether some information may be released without violating statutory requirements or harming national security,” particularly in light of previously declassified information regarding this same test.

## II. Analysis

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” 5 U.S.C. § 552(b)(1); *see* 10 C.F.R. § 1004.10(b)(1). Executive Order 12958 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information is exempt from mandatory disclosure under Exemption 1.

Exemption 3 of the FOIA provides for withholding material “specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld.” 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., Michael J. Ravnitzky*, 29 DOE ¶ 80,208 (2005).

The Director of the Office of Security (the Director), has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). As the result of reorganization within the Department, this function is now the responsibility of the Deputy Director of the Office of Security and Safety Performance Assurance (Deputy Director). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Director reviewed the document the DOE had withheld in its entirety.

According to the Deputy Director, the DOE determined on review that, based on current DOE classification guidance, some of the material the DOE withheld from the document may now be released. The information that the DOE continues to withhold falls into two

categories. Some of it concerns intelligence sources or methods, which is currently classified as National Security Information (NSI) under section 1.4(c) of Executive Order 12958, as amended by Executive Order 13292, and is identified as “DOE b(1)” in the margin of a redacted version of this document, which will be provided to the Appellant under separate cover. Because NSI is defined as classified information in Executive Order 12958, it is exempt from mandatory disclosure under Exemption 1 of the FOIA. Other information in this document that the DOE continues to withhold concerns nuclear weapons design that is currently classified as Restricted Data (RD) and is identified as “DOE b(3)” in the margin of the document. RD is a form of classified information the withholding of which is required under Atomic Energy Act of 1954, and is therefore exempt from mandatory disclosure under Exemption 3.

The denying official for the DOE’s withholdings is Mr. Michael A. Kilpatrick, Deputy Director, Office of Security and Safety Performance Assurance, Department of Energy.

Based on the Deputy Director’s review, we have determined that Executive Order 12958 and the Atomic Energy Act require DOE to continue withholding portions of the document under consideration in this Appeal. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemptions 1 and 3, the disclosure is prohibited by executive order or statute. Therefore, those portions of the document that the Deputy Director has now determined to be properly classified must be withheld from disclosure. Accordingly, the Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on August 16, 2005, Case No. TFA-0115, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the memorandum to Atomic Energy Commission Chairman Glenn T. Seaborg, dated November 19, 1964, concerning the Chinese nuclear test in October 1964, will be provided to the National Security Archive.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: September 6, 2006